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venting the proper execution by a third person of a codicil in the plaintiff's favor, a demurrer was sustained because it was not clearly stated that the testator's intention of benefiting the plaintiff, as manifested in the invalid codicil, continued unchanged until the death of the testator. The principal case might well have been decided on a similar ground. It appeared that the plaintiff's father, subsequent to the transfers complained of, had executed a will of his remaining property in favor of the defendants, and the will had been probated; and though there were also charges of fraud in inducing the execution of this will, and of lack of testamentary capacity, the court properly held, on that aspect of the case, that the probate decree was not subject to collateral attack, and so long as it stood, was conclusive on the issue of testamentary capacity, and all other issues involved in the validity of the will. It would seem to follow that, until the plaintiff could set aside the will, he could not show that he had lost anything by the previous transfers. It is to be regretted, however, that the court disposed of the case so readily on what seems a very imperfect analogy to the ordinary cases of fraudulent conveyances, and thus missed the opportunity to throw new and much needed light on the still unsettled question of the basis and limits of tort liability, as well as on the specific problem on which authority is so very meagre.¹³

M. B.

ENCROACHMENTS BELOW GROUND OR WELL ABOVE THE SURFACE:
IS EJECTMENT AN ADEQUATE LEGAL REMEDY?

In a recent case it was held that ejectment would lie where the bay window and eaves of a house projected over an adjoining owner's land. The court based its decision, rendered over the defendant's objection that the plaintiff should have sought her remedy in equity, partly on the ground that the defendant had refused to make any compromise with the plaintiff outside of court, and partly on the fact that the projections could be cut off without materially affecting the rest of the building. *McDivitt v. Bronson* (1917, Neb.) 163 N. W. 761.

Whether or not ejectment will lie in cases similar to that just stated is a question to which the courts have given contradictory

¹³ It would seem that the case might naturally have been considered as a suit for defamation with allegation of special damage, but this view of it was not discussed by the court, and even if it were so considered, since damage in such a case is the gist of the action, the question would still remain whether the damage complained of was of such a character and so related to the alleged wrongful conduct that the law would allow it to be recovered.

answers.¹ Those jurisdictions which allow the action to be brought for overhanging projections do so on the theory that the owner of land may be ousted from his possession by structures built above or below the surface, as well as by those built upon the surface. Opposed to this view are those authorities which regard the encroachment as only the invasion of a right, and not an ouster.² As to what constitutes ouster as contrasted with mere trespass, in the kind of encroachments under discussion, the conflicting decisions do not allow the formulation of a rule. Seemingly the one essential on which all are agreed, is a permanency, or probable permanency, in the encroaching structure. That the owner should be interfered with in the actual, in distinction from the theoretical, enjoyment of his land is apparently not always necessary.³ In regard to foundation walls which encroach below the ground, no part of the superstructure extending over the dividing line, the courts are no more agreed than in the case of encroaching eaves and cornices.⁴

From the standpoint of practical application to actual conditions, the disadvantage of ejectment as a remedy in cases of encroachment lies not so much in the difficulty of determining what constitutes ouster, as in the obstacles which may confront the sheriff in the execution of the judgment. The order to remove encroaching overhead wires may be carried out easily enough when the wires in question are merely telephone wires;⁵ but the sheriff well might hesitate to remove wires carrying a powerful current of electricity. The removal of encroaching

¹ Ejectment was allowed in the following cases: *Murphy v. Bolger Bros.* (1888) 70 Vt. 723, 15 Atl. 365; *Johnson v. Minnesota Tribune Co.* (1904) 91 Minn. 476, 98 N. W. 321. Ejectment was not allowed in *Vrooman v. Jackson* (1876, N. Y. Sup. Ct.) 6 Hun 326; *Huber v. Stark* (1905) 124 Wis. 359, 102 N. W. 12.

² See *Norwalk Heating & Lighting Co. v. Verman* (1903) 75 Conn. 662, 58 Atl. 168. If the encroachment continues long enough, the owner of the projecting structure acquires an easement. *Grace M. E. Church v. Dobbins* (1893) 153 Pa. St. 294, 25 Atl. 1120. But he gets no claim to the land below the projection, and can not prevent the owner from building thereon. *Keats v. Hugo* (1874) 115 Mass. 216.

³ But under certain circumstances the fact that the plaintiff is not prevented from taking possession of the surface of the land may be an additional reason for refusing ejectment. *Harrington v. Port Huron* (1891) 86 Mich. 46, 48 N. W. 641.

⁴ Ejectment will lie: *McCourt v. Eckstein* (1867) 22 Wis. 153; *Wachstein v. Christopher* (1907) 128 Ga. 229, 57 S. E. 511. It will not lie: *Rahn v. Milwaukee R. R. Co.* (1899) 103 Wis. 467, 79 N. W. 747; especially where the plaintiff has later erected a building up to the true line and has used as a foundation the projecting portion of the defendant's wall. *Zander v. Brewing Co.* (1897) 95 Wis. 162, 70 N. W. 164.

⁵ *Butler v. Telephone Co.* (1906) 186 N. Y. 486, 79 N. E. 716.

underground waterpipes would probably be a task of no considerable magnitude provided the pipes were empty;⁶ but if water under pressure were being forced through them, the difficulties of the sheriff who should attempt to remove them would be almost insurmountable. Nor should the sheriff be expected to carry out an order of removal when by so doing he would be forced to enter upon the defendant's land or injure his building, and thus render himself liable to an action of trespass.⁷ It has been recognized that even in such a seemingly simple operation as cutting off projecting cornices, the sheriff ought to be protected against the danger of taking more than his "pound of flesh."⁸ And on what basis shall the sheriff execute a writ commanding the removal of two feet of an encroaching foundation wall, when it is found that the remaining portion of the wall would not be sufficient to support the building?⁹

This inability of the sheriff to remove the encroachment doubtless has led many of the courts to grant mandatory injunctions in this class of cases; it is not only more equitable, but easier, oftentimes, to put the burden of removing the encroachment directly upon him who caused it to be erected.¹⁰ Consequently mandatory injunctions have been granted ordering the defendant to remove the encroaching eaves or foundation wall.¹¹ Or in the alternative he has been allowed to accept a compromise which has been offered by the plaintiff and found equitable by the court.¹² One jurisdiction at least has enforced the injunction

⁶ In the case of sewer pipes a mandatory injunction has been refused on the ground that the remedy by ejectment is adequate. *Kiernan v. Mayor of Jersey City* (1909) 76 N. J. Eq. 114, 74 Atl. 139. But see *Harrington v. Port Huron*, *supra*.

⁷ "It cannot be removed by execution, because of the damage to the remainder of defendant's property. By taking down the wall it would impose a risk of damage upon the sheriff which he is not bound to incur in an execution." *Blake v. McCarthy* (1909, Trial T.) 115 N. Y. Supp. 1014.

⁸ *Norton v. Elwert* (1895) 29 Oreg. 583, 41 Pac. 926.

⁹ *Curtiss Mfg. Co. v. Spencer Wire Co.* (1909) 203 Mass. 488, 89 N. E. 534.

¹⁰ *Baron v. Korn* (1891) 127 N. Y. 224, 27 N. E. 804.

¹¹ Injunction to remove projecting eaves or cornice. *Wilmarth v. Woodcock* (1885) 58 Mich. 482, 25 N. W. 475; *Pentony v. Penn. R. R.* (1911) 231 Pa. St. 464, 80 Atl. 1052; *Norwalk Heating and Lighting Co. v. Vernam*, *supra*. Injunction to remove encroaching foundation wall. *Mulrein v. Weishecker* (1899 N. Y.) 37 App. Div. 545, 56 N. Y. Supp. 240; *Curtiss Mfg. Co. v. Spencer Co.* *supra*. In one case an injunction was granted as to the eaves of a building, the defendant having deliberately extended them over the line; but it was refused as to the foundation, where the encroachment was unintentional and very slight. *Harrington v. McCarthy* (1897) 169 Mass. 492, 48 N. E. 278.

¹² *Blake v. McCarthy*, *supra*.

strictly even in a case of innocent mistake on the defendant's part, and where the uncompromising attitude of the plaintiff has made the work of removal unnecessarily hard.¹³

It has been a question whether, if ejectment will lie, and the plaintiff elects that remedy, he is later entitled to equitable relief if he has been successful in his action at law. Since equity will not interfere where the plaintiff has an adequate legal remedy, will the remedy afforded by an action of ejectment be regarded as adequate?¹⁴ Must the successful plaintiff rest content in the knowledge that the sheriff is under a duty to remove an encroachment which he is practically powerless to remove? On principle, equitable relief should be granted when it turns out that what, in theory, is an adequate legal remedy, is, in fact, no remedy at all. But hitherto it has not been possible to support this thesis with authority, so far as ejectment cases are concerned. On the contrary it has been held that one who has recovered in ejectment might not later come into equity to compel the defendant to remove the encroachment.¹⁵ A recent New Jersey decision takes the opposite and more just view. In this case, after the plaintiff in an action of ejectment had procured a judgment and had had execution issued thereon, the sheriff refused to remove the encroaching wall, built wholly below the surface of the ground, because the large size of the foundation stones made such removal impossible without trespassing on the defendant's land and injuring his building, which did not extend over the line above the surface. A mandatory injunction was issued to compel the defendant to remove the obstruction. *Hirschberg v. Flusser* (1917, N. J.) 101 Atl. 191. This seems the correct solution of the problem.

G. E. W.

¹³ *Pile v. Pedrick* (1895) 167 Pa. St. 296, 31 Atl. 646, 647. This seems too severe on the defendant; but it has not been overruled. See *Baugh v. Bergdoll* (1910) 227 Pa. St. 420, 76 Atl. 207.

¹⁴ Even where a portion of the building, as well as the foundation wall, overlapped the line, it has been held that the proper remedy was at law in an action of ejectment, and not in equity. *Beck v. Ashland Cigar Co.* (1911) 146 Wis. 324, 130 N. W. 464. And see *Cromwell v. Hughes* (1906) 144 Mich. 3, 107 N. W. 323.

¹⁵ This was under a code which provided that the action should not be split. *Hahl v. Sugo* (1901) 169 N. Y. 109, 62 N. E. 135. To the same effect is *Gilbert v. Boak Fish Co.* (1902) 86 Minn. 365, 90 N. W. 767.